NO. 363

In the Supreme Court of the United States

OCTOBER TERM, 1950

---

62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ETC., ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 363

62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ETC., ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 25-27) is reported at 87 F. Supp. 735. The majority and dissenting opinions in the Court of Appeals (R. 57-67) are reported at 183 F. 2d 1014.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1950 (R. 67), and petition for

rehearing (R. 67-73) was denied on July 22, 1950 (R. 78). The petition for a writ of certiorari was filed on October 16, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an article which purports to be a food for which a standard of identity has been prescribed under Section 401 of the Federal Food, Drug, and Cosmetic Act but which fails to conform to the standard is relieved of a charge of misbranding under Section 403(g) by a label which describes the food as "imitation."

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, c. 675, 52 Stat. 1040, as amended June 24, 1948, c. 613, 62 Stat. 582, 21 U.S.C. 301, *et seq.* (hereinafter sometimes referred to as "the Act"), provides in pertinent part:

> Section 304 (21 U.S.C. 334). (a) Any article of food, * * * that is * * * misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *.

Section 401 (21 U.S.C. 341). Whenever in the judgment of the [Federal Security] Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, * * *.

Section 403 (21 U.S.C. 343). A food shall be deemed to be misbranded—

* * *

(e) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

* * * *

(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, * * *.

STATEMENT

A libel of information was filed by the United States in the District Court for the District of New Mexico pursuant to Section 304 of the Federal Food, Drug, and Cosmetic Act seeking the condem-

nation of 62 cases of a food labeled "Imitation Jam" of assorted flavors. The libel alleged that the food was misbranded within the meaning of Section 403(g) of the Act in that it purported to be and was represented as fruit jam, a food for which definitions and standards of identity had been established pursuant to Section 401, but failed to conform to such definitions and standards because it was deficient in fruit and was not concentrated to the degree required by the standards. (R. 3-6). The definitions and standards of identity for fruit jams established pursuant to Section 401[1] provide that these foods shall be composed of not less than 45 parts by weight of fruit to each 55 parts by weight of one of the designated saccharine ingredients, and that the soluble solids content of blackberry, strawberry, and grape jam shall be not less than 68%, and of apricot, peach, and plum jam, not less than 65%. The jams in question contained the ingredients provided for in the standards, but the amount of fruit was reduced to 25% and the deficiency was replaced by a pectin solution. (R. 22-23). The label contained in small type a truthful statement of the proportions of the ingredients (see R. 59).

The Pure Food Manufacturing Co. appeared as claimant and filed an answer admitting that the jam did not comply with the definitions and standards of identity. It denied, however, that the

[1] 21 C.F.R. (1949 ed.) 29.0, pp. 81-84.

article purported to be or was represented as fruit jam, and set up as an affirmative defense the claim that it was "imitation jam," that it was truthfully labeled as such, and that the Act makes specific provision in Section 403(c) for the labeling of imitation foods. (R. 12-14.)

The District Court found that the article under seizure has the appearance of fruit jams for which definitions and standards of identity have been established; that it was made to taste like, and does taste like, standardized fruit jams; that it is used by consumers in place of, and as a substitute for, real fruit jams (R. 24); that it is often advertised as jam and that orders by the consuming public for jam were frequently filled with the article (R. 22); that a menu of a hotel carried the printed statement, "Jellies or preserves served with above orders," and that patrons requesting such foods were served a product identical to the jams in question without disclosure that they did not comply with the standards for jam (R. 23). Notwithstanding these findings the court concluded that the jams did not purport to be and were not represented as fruit jams, and that they were imitation jams and properly labeled under Section 403(c) (R. 24). The libel of information was accordingly dismissed (R. 28).

In reversing the judgment of the District Court, the Court of Appeals held, one judge dissenting, that "the undisputed facts show that they [the

jams in question] purported to be, and were represented to be a fruit jam, for which a definition and standard of identity had been prescribed" (R. 60), and that the manufacturer cannot escape the impact of Sections 401 and 403(g) of the Act by labeling such an article "imitation jam" and by truthfully setting forth on the label the proportions of the ingredients (R. 62-63). The dissenting opinion takes the view that Section 403(c) permits the marketing of the seized article (R. 65).

ARGUMENT

As we read the petition, petitioners do not seriously dispute the holding below that the product, although labeled "imitation jam," purports to be jam, an article of food for which definitions and standards of identity have been prescribed pursuant to Section 401 of the Act, *supra*, p. 3. The real question is whether such a food, so labeled, which does not conform to the standard and is therefore misbranded under Section 403(g), *supra*, p. 3, is nevertheless exempted from a charge of misbranding by reason of Section 403(c), *supra*, p. 3, which provides that a food shall be deemed to be misbranded "If it is an imitation of another food, unless its label bears, * * * the word 'imitation.'"

Section 403(g) is clear and direct. It provides that any product which purports to be a food which has been defined and standardized under Section 401 is misbranded if it does not conform to the definition and standard. Section 403(g) makes no

exception with respect to foods which comply with Section 403(c) or with any other section. It does not provide—as it readily could have been made to provide—that it is not violated by a food which purports to be a standardized food and does not conform to the standard if it is truthfully labeled or if its label contains the word "imitation." The test for compliance with Section 403(g) is (1) whether the food purports to be or is represented as a standardized food, and (2) whether it conforms to the standard.

Our position that the labeling of a sub-standard food as an "imitation" and the truthful disclosure of its ingredients does not relieve it of a charge of misbranding under Section 403(g) is strongly supported by the decision of this Court in *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218. In that case the Court, in discussing labeling as related to food standards, pointed out that a standard of identity established pursuant to Section 401 cannot be avoided by truthful and informative labeling (pp. 230-231):

> Both the text and legislative history of the present statute plainly show that its purpose was not confined to a requirement of truthful and informative labeling. False and misleading labeling had been prohibited by the Pure Food and Drug Act of 1906. But it was found that such a prohibition was inadequate to protect the consumer from "economic adultera-

tion," by which less expensive ingredients were substituted, or the proportion of more expensive ingredients diminished, so as to make the product, although not in itself deleterious, inferior to that which the consumer expected to receive when purchasing a product with the name under which it was sold. Sen. Rep. No. 493, 73d Cong., 2d Sess., p. 10; Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 10. The remedy chosen was not a requirement of informative labeling. Rather it was the purpose to authorize the Administrator to promulgate definitions and standards of identity "under which the integrity of food products can be effectively maintained" (H.R. Rep. 2139, 75th Cong., 3d Sess., p. 2; H.R. Rep. 2755, 74th Cong., 2d Sess., p. 4), and to require informative labeling *only where no such standard had been promulgated,* where the food did not purport to comply with a standard, or where the regulations permitted optional ingredients and required their mention on the label. §§403(g), 403(i); see Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 12; Sen. Rep. No. 493, 73d Cong., 2d Sess., pp. 11-12.

The provisions for standards of identity thus reflect a recognition by Congress of the inability of consumers in some cases to determine, solely on the basis of informative labeling, the relative merits of a variety of prod-

> ucts superficially resembling each other. * * * [Italics supplied.]

In *Libby, McNeill & Libby* v. *United States*, 148 F. 2d 71 (C. A. 2), the product involved complied with the standard established for tomato catsup except that it contained benzoate of soda, which was not permitted by the standard. The claimant attempted to avoid a charge of misbranding under Section 403(g) by labeling the product "tomato catsup with preservative." In affirming the condemnation decree of the District Court, the Court of Appeals said (p. 73):

> If producers of food products may, by adding to the common name of any such product mere words of qualification or description, escape the regulation of the Administrator, then the fixing of a standard for commonly known foods becomes utterly futile as an instrument for the protection of the consuming public.

That Congress intended that the integrity of identity standards be upheld and that they be applied without variation is also clear from other provisions of the Act. Congress granted permission in Section 403(h) (21 U.S.C. 343 (h)) to use a statement on the label to show that an article of food falls below a standard of *quality* or below a standard of *fill of container* established by the Administrator under Section 401. No such permis-

sion was granted in Section 403(g) as to an article of food which does not conform to an applicable standard of *identity*. The very fact that Congress thus specifically provided for the use of a substandard legend in respect of quality or fill of container but made no similar provision in respect of a standard of identity is cogent evidence of a purpose not to permit evasion of such a standard by labeling the food as an imitation.

This conclusion is supported as well by Sections 401 and 403(g), when considered in relation to the "distinctive name" proviso of Section 8 of the Food and Drug Act of 1906, 34 Stat. 771.[2] Experience under that proviso had demonstrated the deficiencies of the old statute in preventing the debasing and cheapening of food products by economic adulteration. Thus in *United States v. Ten Cases, More or Less, Bred Spred*, 49 F. 2d 87 (C.A. 8), the Government proceeded under the 1906 Act against a product sold under the name "Bred Spred," which resembled jam but contained only

[2] "* * * *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced."

half the normal fruit content, as measured by trade and household practices. The Court of Appeals affirmed a judgment for the claimant, holding that the product was neither adulterated nor misbranded because it was sold under its "distinctive name." The House Committee on Interstate and Foreign Commerce, in reporting on the bill which was enacted as the Federal Food, Drug, and Cosmetic Act, referred to this decision as follows (H. Rep. No. 2139, 75th Cong., 3d sess., p. 5, accompanying S. 5):

> Section 401 provides much needed authority for the establishment of definitions and standards of identity and reasonable standards of quality and fill of container for food. One great weakness in the present food and drugs law is the absence of authoritative definitions and standards of identity except in the case of butter and some canned foods. The Government repeatedly has had difficulty in holding such articles as commercial jams and preserves and many other foods to the time-honored standards employed by housewives and reputable manufacturers. The housewife makes preserves by using equal parts of fruit and sugar. The fruit is the expensive ingredient, and there has been a tendency on the part of some manufacturers to use less and less fruit and more and more sugar.

> The Government has recently lost several cases where such stretching in fruit was involved because the courts held that the well-established standard of the home, followed also by the great bulk of manufacturers, is not legally binding under existing law.[3]

It is clear, therefore, that Congress intended in Sections 401 and 403(g) to do away with the doctrine of the *Bred Spred* case and require strict adherence to standards of identity established under Section 401, without regard to the name or the truthfulness and accuracy of the labels a manufacturer might attach to a product which purports to be a standardized food.

In the light of these considerations it cannot validly be contended that the provisions of Section 403(e) concerning the labeling of imitation foods creates a loophole for avoidance of the independent provisions of Sections 401 and 403(g) covering standardized foods. Section 403(e) is not, as

---

[3] Petitioners' reliance (Pet. 16-17) upon the testimony in 1935 of Walter G. Campbell, then Chief of the Food and Drug Administration, is unavailing. The fact that at that time Mr. Campbell stated as his opinion that there should be no objection to marketing a sub-standard food which is truthfully labeled is not persuasive in view of this Court's views in the *Quaker Oats* case, *supra*, concerning the legislative purpose in enacting Sections 401 and 403(g). Cf. *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 125. Moreover, Mr. Campbell was not there discussing the "imitation" provision and there is nothing in his testimony to indicate that he thought that "imitation jam" is a completely truthful and informative label.

petitioners contend, the equivalent of the second proviso of Section 8 of the 1906 Act, 34 Stat. 771, which had the effect of *exempting* imitation foods, labeled as such, from both the adulteration and misbranding provisions of that statute.[4] Section 403(c) covers generally a distinctive method of misbranding whereby an imitation is foisted upon the consuming public as a genuine article. Thus, there is ample room for that subsection to operate on foods for which no standards of identity have been established. On the other hand, Sections 401 and 403(g), as the history of these provisions show, were aimed specifically at economic adulteration of foods for which standards of identity have been established. As to such foods, Section 403(g) categorically requires strict adherence to the standards. Petitioners' contention would defeat the purpose of Sections 401 and 403(g) to substitute standards of identity for a requirement of truthful and informative labeling (*Federal Security Administrator* v. *Quaker Oats Co., supra*) by reading Section 403(c) as though, like the second proviso of Sec-

[4] "* * * *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

* * *

"Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: * * *"

tion 8 of the 1906 Act, it creates a general exemption for all imitation foods labeled as such.

It should be noted in this connection that if petitioners are right in their contention that Section 403(c) creates an exemption to Section 403(g), it would seem to follow that Section 403(k) (21 U.S.C. 343(k) adds still another exception. The latter subsection provides that a food will be deemed to be misbranded "If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact." We think it could hardly be contended that Section 403(k) permits the use, in a standardized food, of artificial ingredients not authorized by the standard. Such a contention is effectively met by the decision in the *Libby, McNeill & Libby* case, *supra*.

It is illogical to argue that proof of compliance with one of the definitions of misbranded foods contained in Section 403 precludes inquiry as to whether a food is misbranded in another respect. It has never been held that compliance with one provision of the Act in any way cures a violation of some other provision. On the contrary, the effect of the decisions is that the various provisions against misbranding and adulteration are each to be given their full effect so as to give the ultimate consumer the full protection of all those provisions. *United States* v. *Coca Cola Co.*, 241 U.S. 265, 278; *United States* v. *Two Bags * * * Poppy Seeds*, 147 F. 2d 123 (C.A. 6); *United States* v.

36 Drums of Pop'n Oil, 164 F. 2d 250 (C.A. 5); *United States v. 716 Cases, etc., Del Comida Brand Tomatoes*, 179 F. 2d 174 (C.A. 10).

Section 403(g) is the key provision of the statute for the enforcement of definitions and standards of identity established pursuant to Section 401. If Section 403(g) can be circumvented by the simple device of using an "imitation" label on a product which does not conform to a definition and standard of identity, but which by appearance and taste and merchandising practices conveys the impression that it is a food for which such a standard has been prescribed, the effectiveness of the section, and the salutary features of food standardization, would be destroyed.

It is urged (Pet. 13-15) that petitioners have been trapped by a change of administrative policy in respect of foods labeled "imitation" which purport to be or are represented as standardized foods. It is true that during the first few years after the passage of the 1938 Act the Food and Drug Administration was uncertain as to the position it should adopt regarding foods which purport to be standardized foods, and the Administration in certain informal opinions to the trade[5] sanctioned the

[5] "These opinions are excerpts from day-by-day replies to inquiries concerning the application of the statute to specific problems. They represent the attitude of the Administration in the light of the facts submitted and other available information. Thus, the views expressed are subject to modifica-

use of the word "imitation" on the labels of foods which did not meet the appropriate standard. Later, in the *Quaker Oats* case, *supra*, decided in 1943, this Court concluded after a comprehensive review of the legislative history that Congress deliberately adopted standards of identity as a substitute for informative labeling. It was in reliance upon this decision that the Administration reversed its former policy.[6] The present policy as represented by our contentions here has been followed ever since. There is therefore no basis for petitioners' contention that they were misled by "a swift change" (Pet. 15) of administrative policy.

Petitioners attempt to make much of the statements in the last paragraph of the majority opinion below (R. 63) to the effect that the decision will not necessarily have the effect of driving substandard foods out of the market and that petitioners' product might be marketed under some other name so long as it does not purport to be fruit jam. Petitioners argue that the effect of this

---

tion by the Administration as additional facts may become available and controlling decisions are rendered by the Federal Courts." Kleinfeld & Dunn, *Federal Food, Drug, and Cosmetic Act*, p. 561.

[6] In Trade Correspondence #427, dated April 14, 1945, Kleinfeld and Dunn, *supra*, p. 746, it was stated that pineapple products purporting to be pineapple preserves, but not complying with the standard, are illegal under any form of labeling, even if labeled as imitation pineapple preserves.

dictum will be to create confusion and revive the doctrine of the *Bred Spred* case, *supra* (Pet. 9-11, 12-13). We agree that these statements were unnecessary to the decision, and we think they are wrong. We attempted to have them eliminated by filing a suggestion for modification of the opinion (R. 74-77). However, the short answer to petitioners' reliance upon these statements by the majority below as a basis for invoking the certiorari jurisdiction of this Court is that they were only dicta and that it will be time enough to consider the questions they evoke when the hypothetical situations to which they relate are actually presented for decision.

CONCLUSION

For the reasons stated, we respectfully submit that the case does not warrant further review, and that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

ROBERT S. ERDAHL,
JOHN T. GRIGSBY,
Attorneys.

EDWARD K. ADELSHEIM,
Attorney, Federal Security Agency.

November, 1950.

U. S. GOVERNMENT PRINTING OFFICE 1950—914626/P. O. 296